

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELIZABETH DE COSTER et al., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware
corporation,

Defendant.

Case No. C21-693RSM

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendant Amazon.com, Inc. (“Amazon”)’s Motion to Dismiss, Dkt. #35. Plaintiffs have filed an opposition brief, Dkt. #39. The parties have filed numerous notices of supplemental authority. Dkts. #44, #45, #47, #51, #52, and #55.

The Court can rule on this Motion without oral argument. For the reasons stated below, the Court GRANTS IN PART AND DENIES IN PART Amazon’s Motion.

II. BACKGROUND

For purposes of this 12(b)(6) Motion, the Court will accept all facts in the Consolidated Amended Complaint (“CAC” or “Amended Complaint”), Dkt. #20, as true. Unless stated otherwise, the following facts are drawn from that pleading.

Defendant Amazon operates the largest online retail marketplace in the United States. Amazon sells its own goods, but also designed its marketplace to be a platform where third-party merchants can register and list their goods for Amazon to sell.

1 Third-party merchants post their products on the platform, which Amazon presents to
2 users together with its own goods according to a certain algorithm that takes the form of a
3 ranking list.

4 At the time the pleading was drafted, Amazon's marketplace accounted for over 50% of
5 all online retail sales revenue in the United States. By comparison, Amazon's two closest
6 competitors, eBay and Walmart, accounted for only 6.1% and 4.6%, respectively, of that
7 revenue.
8

9 Many third-party merchants listing their goods on Amazon's marketplace also sell their
10 goods on other platforms—including on their own websites and on competing online
11 marketplaces.
12

13 Amazon competes both (a) as a retailer against the third-party merchants that list their
14 goods on Amazon's marketplace, and (b) as a marketplace, against other online retail
15 marketplaces, such as eBay and Walmart, where third-party merchants can list their goods.
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17 Amazon is critical to the financial success of its third-party merchants. Almost half of
18 the third-party merchants who list their goods on Amazon's marketplace generate between 81%
19 and 100% of their revenues on it.

20 The Amended Complaint asserts that Amazon charges higher fees for third-party
21 merchants than competitor marketplaces and that these inflated fees are passed on to customers
22 like Plaintiffs through higher prices.
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24 In a competitive market, third-party merchants would be able to sell their products for
25 less in competitor marketplaces. Amazon bars this type of competition by imposing on third-
26 party merchants Platform "Most Favored Nation ("MFN") policies, or did so during the
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1 relevant time period. Amazon’s MFN policies forbid third-party merchants from listing their
2 goods anywhere else on the internet at prices lower than their Amazon list prices.

3 An investigation by the House of Representatives Judiciary Committee’s Subcommittee
4 on Antitrust, Commercial, and Administrative Law (the “House subcommittee on antitrust”)
5 found that “Amazon has a history of using MFN clauses to ensure that none of its suppliers or
6 third-party sellers can collaborate with an existing or potential competitor to make lower-priced
7 or innovative product offerings available to consumers.”

9 Amazon imposes its MFN policies on third-party merchants through the Amazon
10 Business Solutions Agreement (BSA). Every third-party merchant that registers to list goods
11 on Amazon’s marketplace must “agree[] to the terms of the [BSA] and the policies
12 incorporated in that agreement.”

14 Until March 2019, Amazon enforced its MFN policies through BSA’s “Price Parity
15 Clause,” which expressly prohibited third-party merchants from listing goods on other online
16 retail platforms—whether marketplaces or single-merchant websites—at prices lower than their
17 Amazon list prices. In late 2013, because of German and United Kingdom antitrust
18 proceedings, Amazon voluntarily abandoned its price parity clause on an EU-wide basis.
19 Amazon continued to enforce that clause in the United States for six more years.

21 Even after withdrawing this clause, Amazon continues to enforce MFN-type policies
22 through its so-called “Fair Pricing” Policy. This policy in the BSA states that, if a third-party
23 merchant engages in pricing practices with regard to “a marketplace offer that harms customer
24 trust,” Amazon may impose sanctions. According to the policy, a “pricing practice that harms
25 customer trust” occurs if a merchant lists goods on a competing online retail platform at prices
26 that are significantly below its Amazon list prices. Sanctions include making the merchant’s
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1 product ineligible for a feature (the “Buy Box” button) that would make the product the most
2 visible and easiest to purchase among similar goods; removing the third-party merchant’s
3 goods from Amazon’s marketplace; suspending shipping options for the merchant’s goods; and
4 terminating or suspending the merchant’s ability to have any goods sold on Amazon’s
5 marketplace.

6
7 The intent and effects of the “Fair Pricing” Policy are the same as those of the former
8 Price Parity Clause. These effects can be anticompetitive by, e.g., preventing merchants from
9 listing their goods at lower prices on other platforms that charge lower (or no) fees, and
10 preventing other online retail marketplaces from competing with Amazon by hosting those
11 third-party merchants’ products at lower prices. Taking these pled facts as true, Amazon’s
12 MFN policies cause Amazon customers to pay more for goods purchased on its marketplace
13 than they would pay in a competitive market.
14

15 Amazon enforces these policies by, e.g., systematically monitoring the prices listed by
16 third-party merchants on other online retail platforms.
17

18 Named Plaintiffs are residents of Maryland, Washington, D.C., Illinois, Texas,
19 Tennessee, and Connecticut who purchased numerous goods from Amazon’s marketplace,
20 including those listed by third-party merchants. They bring this action on behalf of themselves,
21 and as a class action on behalf of all persons who, on or after May 26, 2017, purchased one or
22 more goods on Amazon’s marketplace.
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24 The Amended Complaint includes causes of action for per se and not per se violation of
25 the Sherman Act under 15 U.S.C. § 1 (First and Second Causes of Action), violation of the
26 Sherman Act under 15 U.S.C. § 2 for monopolization (Third Cause of Action), and violation of
27 the Sherman Act under 15 U.S.C. § 2 for attempted monopolization (Fourth Cause of Action).
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III. DISCUSSION

A. Legal Standard under Rule 12(b)(6)

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true, and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff’s claims must be dismissed. *Id.* at 570.

B. Analysis

Amazon’s first argument for dismissal is that its MFN policies are legal as a matter of law. Dkt. #35 at 16. Amazon recharacterizes the policies found in the Amended Complaint as a “Retail Competitive Price Provision” and an “Anti-Gouging Policy.” *Id.* Amazon argues that its policies “provide for competitive prices to consumers, rather than for itself” and that “[n]o court has ever condemned competitive price policies like these.” *Id.*

The fact that no Court has ever found a policy like these to violate the Sherman Act does not, in itself, render these claims implausible. Amazon goes on to argue that certain cases

1 have found that “competitive price provisions favoring consumers... do not violate the antitrust
2 laws.” *Id.* (citing *Kartell v. Blue Shield of Mass. Inc.*, 749 F.2d 922, 928-29 (1st Cir. 1984)).

3 The Court finds that the facts alleged in this case are not sufficiently analogous to those
4 in *Kartell* or its progeny of insurance cases. Making all inferences in the light most favorable
5 to the non-moving party, Plaintiffs’ facts are adequate to escape the legal conclusions of those
6 cases. To the extent Amazon is asking the Court to construe the facts in an unfavorable light,
7 such is contrary to Rule 12(b)(6) and premature given the undeveloped factual record. *See*,
8 *e.g.*, Dkt. #35 at 18-19 (“...to the extent Plaintiffs’ claims are based on the MFPP, they should
9 be dismissed because the CAC’s characterization of the policy as an MFN is demonstrably
10 incorrect.... The Court should hold the MFPP procompetitive as a matter of law because it
11 benefits consumers”).

14 Amazon’s second point is that the First Cause of Action fails to allege any “concerted
15 action.” *Id.* at 19. It argues “[c]ourts routinely dismiss Section 1 claims where the claim rests
16 only on one party’s establishment or enforcement of contract terms or policies that another
17 party is required to follow.” *Id.* at 20. Amazon cites to, *inter alia*, *Sambreel Holdings LLC v.*
18 *Facebook, Inc.*, 906 F. Supp. 2d 1070, 1076 (S.D. Cal. 2012) where “the plaintiff alleged that
19 Facebook’s contract with Application Developers ‘includes a provision that obligates
20 Application Developers to use only the Advertising Partners that have been approved by
21 Facebook,’ and.... The court held the complaint lacked ‘sufficient facts to support the
22 allegation that there was concerted effort among the Application Developers and Facebook, as
23 is required by the express terms of Sherman Act § 1, as opposed to unilateral action on the part
24 of Facebook.’” *Id.* Plaintiffs respond that “Amazon seeks to pass off its binding agreements
25 containing price restrictions with third-party merchants as if the conduct at issue were nothing
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1 more than Amazon's own 'independent' or 'unilateral' conduct.... But here the third-party
2 merchants are active participants in the price restraint, even if Amazon is the one driving it."
3 Dkt. #39 at 17. Plaintiffs run through Amazon's other cited cases supporting its argument and
4 conclude:

5 These cases do not control here, because Amazon's MFN policies
6 are neither vertical price restraints (they do not place conditions on
7 the resale of Amazon's own products), nor intrabrand price
8 restraints (they restrain competitive pricing across all brands and
9 unbranded goods that third-party merchants sell on Amazon's
10 platform, even though produced and supplied by companies other
11 than Amazon). Put simply, Amazon and each third-party merchant
12 has entered into a horizontal price-fixing agreement that controls
13 how third-party merchants set prices for goods that directly
14 compete with Amazon's goods. The merchants participate in this
15 conduct—albeit unwillingly—by setting prices in compliance with
16 the agreed-upon price restraint. This conduct plainly satisfies the
17 requirement of a concert of action under Section 1.

18 *Id.* at 19–20.

19 For purposes of this Motion to Dismiss, the Court agrees with Plaintiffs that Amazon
20 has failed to demonstrate a lack of concerted action, or that concerted action is implausible.
21 Taking the facts in the light most favorable to Plaintiffs, the third-party merchants are active
22 participants who set their prices and otherwise engage with Amazon's policies in an active,
23 albeit allegedly unwilling, way. This affects horizontal competitors in a unique way not
24 analogous to the cases cited by Amazon.

25 Amazon next maintains that the third cause of action, for *per se* violation of Section 1,
26 should be dismissed because that rule is limited to agreements between horizontal competitors.
27 Dkt. #35 at 21–22. Per se liability is reserved for only those agreements that are “so plainly
28 anticompetitive that no elaborate study of the industry is needed to establish their illegality.”
Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (citing *National Soc. of Professional Engineers v.*

1 *United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)). “Price-fixing
2 agreements between two or more competitors, otherwise known as horizontal price-fixing
3 agreements, fall into the category of arrangements that are per se unlawful.” *Id.*

4 Plaintiffs argue that “[a]ll the Supreme Court requires for per se liability is an
5 agreement among ‘competing retailers’ to ‘reduce[] competition in order to increase price.’”
6 Dkt. #39 at 20 (citing *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007)).

7
8 Plaintiffs do not allege there is an agreement among competing retailers to reduce
9 competition in order to increase price. The facts are significantly more complicated than that.
10 The Amended Complaint essentially includes the “elaborate study of the industry”
11 contemplated by the Court in *Texaco, supra*. As the Court understands it, Plaintiffs allege an
12 unfavorable agreement between Amazon and third-party retailers who use its marketplace, not
13 between Amazon and competing marketplaces. That Amazon and the third-party retailers
14 sometimes compete within the Amazon marketplace adds a layer of complexity, it does not
15 clarify liability. Per se liability is not available on these facts. Accordingly, this cause of
16 action is properly dismissed under Rule 12(b)(6).
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19 Fourth, Amazon argues Plaintiffs “fail to allege facially plausible product markets.”
20 Dkt. #35 at 25. More specifically, Amazon alleges that Plaintiffs have “unnaturally
21 gerrymandered” the relevant market by “excluding physical retailers,” *id.*, and that Plaintiffs’
22 relevant market “includes products that are not reasonably interchangeable,” *id.* at 27.
23

24 “Under the rule of reason, plaintiffs must plead a relevant market to state an antitrust
25 claim under Sections 1 or 2 of the Sherman Act.” *PBTM LLC v. Football Nw., LLC*, 511 F.
26 Supp. 3d 1158, 1179 (W.D. Wash. 2021). A “complaint may be dismissed under Rule 12(b)(6)
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1 if the complaint's 'relevant market' definition is facially unsustainable." *Hicks v. PGA Tour,*
2 *Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (internal quotation marks omitted).

3 Plaintiffs counter Amazon's intense and thorough legal arguments on this point with the
4 following:

5 ... the CAC plausibly alleges two alternative markets: an Online
6 Retail Marketplace Market and an Online Retail Sales Market.
7 CAC ¶¶ 64- 139. The Online Retail Marketplace Market is made
8 up of online platforms, like eBay and Walmart, that provide the
9 services "that enable consumers to buy retail goods listed by
10 multiple independent sellers." *Id.* ¶ 64. The Online Retail Sales
11 Market includes all online retail sales. *Id.* ¶ 69. The contours of
these two markets are well supported by Plaintiffs' allegations and
by economic consensus.

12 Dkt. #39 at 23. Plaintiffs say Amazon is prematurely attacking the facts, and that the proper
13 test at this stage is whether Plaintiffs' markets are "facially unsustainable." *Id.* (citing *Newcal*
14 *Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)).

15 The Court finds the relevant market definitions in the Amended Complaint sustainable
16 on their face. Amazon's arguments are fact-based and premature, essentially asking the Court
17 to hear expert testimony at the motion-to-dismiss stage of litigation. That is not how civil
18 litigation is supposed to proceed and will not serve as a basis for dismissal under Rule 12(b)(6).
19

20 Fifth, Amazon assert that "Plaintiffs allege a multi-step causal chain of injury that is too
21 attenuated to plausibly allege antitrust injury." Dkt. #35 at 30. Amazon characterizes Plaintiffs
22 claims thusly:

23
24 Plaintiffs contend that Amazon's alleged MFN policies first,
25 "nullified competition by other online retail marketplaces on the
26 basis of fees," which, second, allegedly caused "Amazon to
27 continue to charge supracompetitive fees for the use of its
28 marketplace." CAC ¶ 102. Plaintiffs then allege that, third, "third-
party merchants would rationally have set lower prices for their
goods on their own websites and on competing online retail
marketplaces with lower fees." *Id.* Fourth, "in turn, competing

1 online retail marketplaces would have lowered their fees to
2 compete with Amazon on price, or—if their fees were already
3 lower—better succeeded at driving marketplace-level competition
4 by attracting more third-party merchants and more consumers.” *Id.*
5 Fifth, Plaintiffs allege “these market forces would have resulted in
6 competitive pressure that would have forced Amazon to lower its
7 fees,” and sixth, “to lower the prices for its own goods.” *Id.* Based
8 on this six-step chain of causation, Plaintiffs allege Amazon has
9 “kept overall prices high on its marketplace and, therefore, across
10 all online retail marketplaces.” *Id.*

11 *Id.* at 30–31.

12 The Court finds that Plaintiffs’ allegations, although complicated, are not as
13 complicated as Amazon would have it and are not too attenuated to plausibly allege antitrust
14 injury. In the light most favorable to the nonmoving party, this causal chain could be
15 summarized as Plaintiffs put forth in their Response brief: “Amazon’s MFN policies restrain
16 competition in ways that cause consumers to pay supra-competitive prices directly to Amazon.”
17 Dkt. #39 at 30. Plaintiffs point to *Apple v. Pepper*, 139 S. Ct. 1514, 1519 (2019) as factually
18 analogous. Plaintiffs argue that “Amazon’s argument that third-party merchants make
19 ‘independent pricing decisions’ also defies the CAC, which alleges that Amazon uses its MFN
20 policies to block third-party merchants from making truly independent pricing decisions. *Id.* at
21 31 (citing CAC ¶¶ 100-121). Plaintiffs’ point is plausible.

22 Finally, Amazon contends that Plaintiffs’ injuries arise from “conduct in a different
23 market,” *i.e.* Plaintiffs paid supra-competitive prices for retail goods based on Amazon’s
24 actions in a different market toward different actors—policies applied and fees charged to
25 third-party sellers. Dkt. #35 at 32. “Where plaintiffs allege injury in a market other than the
26 market in which anticompetitive conduct is alleged to occur, courts dismiss antitrust claims for
27 lack of antitrust standing.” *Id.* (citing *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1027-28
28 (S.D. Cal. 2015) (“Plaintiffs allege that they suffered antitrust injury in the form of

1 supracompetitive pricing in Android phones, which is not the market in which the alleged
2 anticompetitive conduct occurred.”)

3 The Court finds that Plaintiffs allege a valid injury here, even if third-party merchants
4 also have their own cause of action for lost profits. *See In re DDAVP Direct Purchaser*
5 *Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009).

7 IV. CONCLUSION

8 Having reviewed the relevant pleadings and the remainder of the record, the Court
9 hereby finds and ORDERS:

- 10 1) Defendant Amazon’s Motion to Dismiss, Dkt. #35 is GRANTED with respect to
11 Plaintiffs’ First Cause of Action. Plaintiffs’ First Cause of Action, for Violation of
12 the Sherman Act 15 U.S.C. § 1 Per Se, is DISMISSED. Although leave to amend
13 would typically be granted, it is not granted here as Plaintiffs would have to
14 significantly re-work the pleadings in order to bring this claim. Plaintiffs may move
15 for leave to amend if they so choose. The Motion is DENIED as to all other claims.
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- 17 2) The parties are to promptly propose a class certification briefing schedule. *See* Dkt.
18 #41.
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20
21 DATED this 24th day of January, 2022.

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24 RICARDO S. MARTINEZ
25 UNITED STATES DISTRICT JUDGE
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